Petition

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NO. _____

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KIMBROUGH G. MIDDLEBROOK,

PETITIONER

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Missoula, Montana 59803
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QUESTIONS PRESENTED FOR REVIEW

I. DID THE TRIAL COURT ERR IN NOT DISMISSING THE § 7203 CHARGE BASED ON THE FIFTH AMENDMENT CONFLICT BETWEEN § 7203 AND § 7205?

Petitioner says yes.

II. DID THE COURT'S REFUSAL TO INSTRUCT THE JURY AS REQUESTED DENY THE PETITIONER HIS RIGHT TO A "GOOD FAITH" DEFENSE UNDER 26 USC §§ 7203 and 7205?

Petitioner says yes.

III. DID THE TRIAL COURT ERR IN NOT ALLOWING THE PETITIONER TO DEVELOP HIS THEORY OF DEFENSE BY REFUSING TO LET HIM TESTIFY ABOUT WHAT HE RELIED UPON?

Petitioner says yes.

IV. DID THE TRIAL COURT ERR IN NOT DISMISSING THE CHARGES BASED UPON THE VAGUENESS AND AMBIGUITY IN THE LAW REQUIRING FILING OF INCOME TAX RETURNS AND THE LAW CONCERNING FILING W-4 FORMS?

Petitioner says yes.

V. DID THE TRIAL COURT ERR IN OVERRULING PETITIONER'S MOTION TO SUPPRESS?

Petitioner says yes.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	iii
Table of Authorities	v
Opinion Below	1
Jurisdiction	2
Constitutional Provisions And Statutes Involved	2
Statement of the Case	3
Reasons For Review	5
I.	5
II.	12
III.	22
IV.	23
A. The § 7203 Count	25
B. The § 7205 Counts	34
V.	37
Conclusion	39
Affidavit of Service	40
Appendix	A-1
Constitution, Fourth Amendment	A-3

(Table of Contents - Cont.) Page

Appendix (cont.)

Constitution, Fifth Amendment A-3

Constitution, Sixteenth Amendment A-4

Constitution, Article I, § 2, cl.3 A-4

Constitution, Article I, § 8, cl.1 A-4

Constitution, Article I, § 9, cl.4 A-5

26 USC § 7203 A-5

26 USC § 7205 A-5

26 USC § 3402 A-6

26 USC § 6012 A-7

26 USC § 6201 A-8

26 USC § 6203 A-8

Government's Instruction # 14 A-9

Government's Instruction # 17 A-12

Government's Instruction # 18 A-13

TABLE OF AUTHORITIES

Cases — Page

American Airways v. Wallace, 57 F2d 877.....31

Arnstein v. McCarthy, 254 US 71, 41 SCt 26, 65 LEd 138 (1920).....6

Bishop v. U. S., 412 US 346, 93 SCt 2008, 36 LEd2d 941 (1973)....20,23

Brushaber v. Union Pacific R.R.Co., 240 US 1, 36 SCt 236, 60 LEd 493 (1915).....28,29,30

Cooley v. U. S., 501 F2d 1249 (9th Cir.1974), cert den, 419 US 1123 (1975).....21

Counselman v. Hitchcock, 42 US 547, 12 SCt 195, 35 LEd 1110 (1892).....6

Dunn v. U. S., 442 US 100, 99 SCt 2190, 60 LEd2d 723 (1979).....25

East Ohio Gas Co. v. Tax Commissioner of Ohio, 43 Fed 171 (1930).....31

Flint v. Stone Trace Co., 220 US 107, 31 SCt 342, 55 LEd 389 (1910).....31

Garner v. U. S., 424 US 648, 96 SCt 1178, 47 LEd2d 370 (1976)...15,16,17

Haynes v. Oradell, 425 US 610, 96 SCt 1755, 48 LEd2d 243 (1976).....24

Haynes v. U. S., 390 US 85, 88 SCt 772,

(Table of Authorities - Cont.) Page

19 LEd2d 923 (1968).....9,10,12

Hoffman v. U. S., 341 US 479, 71 SCt 814 , 95 LEd 1118 (1951).....6

Leary v. U. S., 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969).....9,10,12

Lefkowitz v. Turley, 414 US 70, 94 SCt 316, 38 LEd2d 274 (1973).....8

Marchetti v. U. S., 390 US 39, 88 SCt 697, 19 LEd2d 889 (1968).....11,12

Murdock v. U. S., 290 US 389, 54 SCt 223, 78 LEd 381 (1933)....13,18,22

Penn Mutual Indemnity Company (Dissolved) v. Commissioner, 32 Tax Court 653.....32

Pollock v. Farmers' Loan & Trust Co., 157 US 429, 15 SCt 673, 39 LEd 759, later op on reh, 158 US 601 15 SCt 912, 39 LEd 1108 (1899)..26,27

Simpson v. U. S., 435 US 6, 95 SCt 909, 55 LEd 2d 70 (1978).....25

U. S. v. Carlson, 617 F2d 518 (9th Cir. 1980).....22

U. S. v. Sullivan, 274 US 259, 47 SCt 607, 71 LEd 1037, 51 ALR 1020 (1927).....15,17

Constitution & Statutes Page

Constitution, Article I, § 2, cl. 3....27

Constitution, Article I, § 8, cl. 1....29

(Table of Authorities - Cont.) Page

Constitution, Article I, § 9, cl. 4....27

Constitution, Fifth Amendment.....9,10,11 12,14,16

Constitution, Sixteenth Amendment...26,27

26 USC § 3402.....34

26 USC § 6012.....25

26 USC § 6201.....36

26 USC § 6203.....36

26 USC § 7203.....5,9,10,12,16,21 22,25

26 USC § 7205.....8,9,10,11,12,34

Others Page

Black's Law Dictionary, Revised 4th Edition.....35

Corpus Juris Secundum, "Excise", pp. 110-111.....30

Corpus Juris Secundum, "Internal Revenue", pp. 125-126.....31

Devit & Blackmar, Federal Jury Instructions, § 35.31.....21

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KIMBROUGH G. MIDDLEBROOK,

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

Petition for Writ of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

Petitioner, KIMBROUGH G. MIDDLEBROOK, respectfully prays this Court to issue a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Fifth Circuit entered on June 22, 1981.

OPINION BELOW

The decision of the United States

Court of Appeals to affirm this cause was made without opinion under the Fifth Circuit Court of Appeals Local Rule 21, and that order appears herein at page A-1.

JURISDICTION

The order affirming the trial court's judgment was entered on June 22, 1981, and the jurisdiction of this Court is invoked under 28 USC § 1254.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Constitution of the United States, Fourth Amendment

Constitution of the United States, Fifth Amendment

Constitution of the United States, Sixteenth Amendment

Constitution of the United States, Article I, § 2, cl. 3

Constitution of the United States, Article I, § 8, cl. 1

Constitution of the United States Article I, § 9, cl. 4

26 USC §§ 7203 and 7205

26 USC §§ 3402, 6012, 6201, and 6203

STATEMENT OF THE CASE

On January 18, 1979, a three-count indictment was filed in the Northern District of Georgia, charging the Petitioner with violating 26 USC § 7203 for 1976 and with violating 26 USC § 7205 on January 20, 1976 and again on April 15, 1977. On those dates, the Petitioner had filed with his employer a W-4 form on which he claimed "exempt" from withholding.

For the tax year 1974, the Petitioner had filed a regular return. For the tax year 1975, the Petitioner had filed a "Fifth Amendment" return on which he had claimed his objections to the questions asked, by specific line item, on the basis of Constitutional provisions including the Fifth and Fourth Amendments. A similar return was filed for 1976 and following. The Petitioner was not prosecuted for the 1975 return.

Following a jury trial, (Honorable Walter Nixon presiding) Petitioner was found guilty on all counts and was sentenced to serve one year, with six months suspended on two years probation, and a fine of $1,000.00. One June 22, 1981, the Fifth Circuit Court of Appeals affirmed the conviction of the Petitioner.

The Petitioner testified that he filed in the manner he did because he felt to do otherwise would waive his rights under the Fourth and Fifth Amendment to the Constitution, and further, that the wages he had received were not taxable under the Internal Revenue Code. However, his testimony as to the law he had relied upon and the other materials he had relied upon were not allowed by the Court. (See volume two of the transcript, at pages 314 through 326).

REASONS FOR ALLOWING THE WRIT

I.

The question presented here can be expressed thusly, does the Fifth Amendment right to be free from being a witness against oneself in a criminal trial disappear if the crime is a tax-related one?

This question has not yet been answered by this Court as it pertains to the interaction between 26 USC §§7203 and 7205, which is the issue here. However, the question has been answered "no" in other circumstances by this Court.

The Court of Appeals, by affirming the conviction of the Petitioner, was saying "yes" to the question.

In this case, assume for purposes of this argument that the §7205 charges were correct, i.e., that the W-4 forms filed with the employers on the dates charged were indeed willfully false and

fraudulent, as the government contends. Then, if a return ahd been filed for 1976 in the manner required by the Internal Revenue Service, showing wages as items of gross income, that return would have been testimony that the W-4 form filed was indeed false and fraudulent.

Therefore, if the Petitioner had indeed filed a standard tax return for 1976, he would have incriminated himself concerning the W-4 charge.

Does then the Fifth Amendment apply? Obviously it should, as that part of the Amendment is to be accorded liberal construction in favor of the right it was intended to secure. Counselman v. Hitchcock, 142 US 547, 12 SCt 195, 35 LEd 1110 (1892), Arndstein v. McCarthy, 254 US 71, 41 SCt 26, 65 LEd 138 (1920).

The case of Hoffman v. U.S., 341 US 479, 71 SCt 814,95 LEd 1118 (1951), provides us with an outline of the con-

text in which this case must be analyzed.

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. Blau v. U.S., 340 US 159, 170, 71 SCt 223 (1950). But his protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. U.S., 244 US 362, 365 61 LEd 1198, 1199, 37 SCt 621 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself-his say so does not in itself establish the hazard of incrimination ...However, if the witness, upon interposing his claim of privilege were required to prove the hazard in the sense in which a claim is required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result. Hoffman, supra at 486, 487.

To assert that the Petitioner might have

incriminated himself had he "provided sufficient information from which to compute a tax liability" (the definition of a legal tax return), is no non sequiter. Had the Petitioner done so, he would have directly impeached his assertion that he had incurred no tax liability, and provided the government with the evidence to convict himself under a prosecution under 26 USC §7205.

As this Court held in Lefkowitz v. Turley, 414 US 70, 94 SCt 316, 38 LEd 2d 274 (1973):

> The (Fifth) Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal where the answers might incriminate him if future proceedings.

It is undisputed that the questions put to taxpayers on a 1040 form are official questions put to the taxpayer by the gov-

ernment, and further that the answers to those questions can be and will be used against a person if it evidences a crime. Garner v. U.S., 424 US 648, 96 SCt 1178, 47 LEd2d 370 (1976).

The Fifth Amendment problems created by 26 USC §§7203 and 7205 are analagous to the situations which this Court confronted in Haynes v. U.S., 390 US 85, 88 SCt 772, 19 LEd2d 923, (1968) and also Leary v. U.S., 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969). Haynes concerned "whether enforcement of §5841 (of 26 USC) against petitioner, despite his assertion of the privilege against self-incrimination, is constitutionally permissable ... and if a prosecution under §5841 would have punished petitioner for his failure to incriminate himself, it would follow that a proper claim of privilege should have provided a full defense to this prosecution." Haynes, supra at 90.

In the instant case the statutes infringe on this Petitioner's Fifth Amendment privilege becasue 26 USC §7205 prohibits certain conduct and failure to provide information which would incrimnate this Petitioner under §7205 comprises the offense charged under 26 USC §7203. In both Haynes and this case, the synergistic effect of two statutes infringes upon the Petitioner's Fifth Amendment rights.

Leary involved the identical issue, phrased thusly by this Court at 23 LEd2d pp. 73-74:

> The aspect of the self-incrimination privilege which was involved in Marchetti and which Petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. . . . Accordingly, we reverse petitioner's conviction.

It is no argument that the Petitioner placed himself in the position from which

he seeks relief under the Fifth Amendment, or that one cannot break one law and then violate another for the reason that not to violate it would incriminate oneself for the first violation. This argument was well answered in the case of Marchetti v. U.S. , 390 US 39,88 SCt 697, 19 LEd2d 889 (1968) which stated at pages 50-51:

> We find this reasoning no longer persuasive. The question is not whether the petitioner holds a "right" to violate state law, but whether having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it.

The same applies here. The question is not if the Petitioner had a right to violate §7205, but, if having done so, may he be compelled to give evidence against

himself about this violation or face charges under § 7203 for failing to incriminate himself. And the answer is the same as it was in Marchetti, Haynes, and Leary, a resounding NO!

Therefore, the trial court erred in not dismissing the § 7203 charge based on the Fifth Amendment conflict between §§ 7203 and 7205.

II.

The instructions granted by the Court in this cause are in total conflict with the applicable decisions of this Court. In some instances, they are even in conflict with other Circuits, notably the Ninth Circuit Court of Appeals.

In particular, the Court granted the government's requested instruction number 14, over the Petitioner's objections. (The full text of this instruction appears in the Appendix). This instruction negated any "good faith" defense to willful failure to file. It

stated:

> The intentional refusal by a taxpayer to reflect little or no income on a tax return form as to his income or expenses with the excuse that to do so would violate his right against self-incrimination under the Fifth Amendment to the Constitution is no legal justification for not filing a timely complete income tax return reflecting the amounts of income for 1976. The same is true for an excuse that Federal Reserve Notes are not legal tender or that the Federal Reserve system is unconstitutional. These are not legal justifications for willful failure to file.

This completely ignores the law that these reasons are indeed legal justifications for not filing <u>if</u> the person holding those views holds them in good faith. <u>U.S. v. Murdock</u>, 290 US 389, 54 SCt 223, 78 LEd 381 (1933) defines willfulness as a thing done without ground for believing it is lawful. Therefore, if a person has grounds for believing that his conduct is indeed lawful, that would negate the element of willfulness.

In other words, a person's good faith beliefs can negate willfulness, and the jury has a right to examine those beliefs to see if indeed they are held in good faith. The jury was not allowed to so do in this case, and the Petitioner was denied a fair trial thereby.

This same problem applies to the government's instruction number 17, also granted by the trial Court. (The full text of this instruction is set forth in the Appendix). This instruction applied to Federal Reserve Notes, and again cut off the Petitioner's right to a good faith defense.

As to the Fifth Amendment privilege, the instructions of the Court again went outside the decisions of this Court. In addition to the language in instruction number 14 cited above that the Fifth Amendment was not a legal justification for failure to file, the Court granted the

the government's instruction number 16 (in Appendix) which stated:

> You are further instructed that a taxpayer may not refuse to enter on his return the necessary information as to his income and expenses by claiming a privilege against self-incrimination. The Fifth Amendment to the Constitution of the United States does not protect or shield a taxpayer from revealing the required financial information or amounts of his income on his income tax return. Therefore, defendant's claim of a Fifth Amendment privilege against disclosing his income on a tax return should not be considered by the jury as a good faith defense to the charge of willful failure to file.

As can be seen, these instructions stated to the jury that under no circumstances can one claim to have a Fifth Amdnement privilege against filing a tax return. This flies directly in the face of this Court's decisions in U.S. v. Sullivan, 274 US 259, 47 SCt 607, 71 LEd 1037, 51 ALR 1020 (1927), and Garner v. U.S., 424 US 648, 96 SCt 1178, 47 LEd2d 379 (1976).

Sullivan not only says that the Fifth Amendment is a defense, it further states that you must raise that defense on the return itself, or you waive it. Garner states not only is the Fifth a

defense to failure to file, even the erroneous but good faith claim of the Fifth Amendment privilege is a defense to a failure to file charge.

A §7203 charge (willful failure to file) can only arise if the person so charged has failed in some manner to put down items of income on his return, as other items which might be lacking would not lead to a failure to file charge. Therefore, Garner stands for the proposition that the Fifth Amendment privilege concerning a tax return embodies the right to refuse to include items of income.

These instructions negated the Petitioner's right to a defense based on the Fifth Amendment, as to whether or not he had correctly claimed it, and further negated his right to a defense based on Petitioner's good faith, but erroneous, claim of the privilege.

In addition to these erroneous instructions (14, 16, 17) all of which were objected to by the Petitioner, the Court refused the Petitioner's instructions which correctly stated the law. As a matter of fact, the trial Court refused all of the Petitioner's requested instructions.

The Petitioner submitted two instructions based on Sullivan, numbers 8 and 11 as follows:

> You are instructed that if a person wishes to assert his Right against Self-Incrimination regarding specific items, he must do so on the tax return itself or forever waive the Privilege.
>
> You are instructed that: "If the tax return form provided called for answers that the Defendant was privileged from making that he could have raised the objection in the return, but could not on that account refuse to make any return at all."

The Petitioner further submitted an instruction based on Garner about the erroneous claim of the privilege in good

faith, number 9.

> You are instructed that even if the Defendant erroneously or mistakenly asserted his Constitutional rights under the Fifth Amendment on the tax returns in question, that if he did so in "good faith" then you must find that the Defendant did not act willfully. If you find that the evidence shows that the Defendant acted in good faith, you must find him not guilty.

Three instructions based on willfulness as defined by Murdock, numbers 4,10, and 14, were offered as follows:

> You are instructed that the specific intent of "willfulness" must be proven in order to convict the Defendant of failure to make an income tax return. The term "willfully," used in connection with this offense, means voluntarily, purposefully, deliberately, with evil motives, or with bad purpose. Mere negligence, even gross negligence, even reckless disregard for the law, is not sufficient to constitute willfulness under criminal law.
>
> However, if you find that the Defendant failed to make a return because of negligence, inadvertence, accident or reckless disregard for the requirement of the law, or due to his good faith misunderstanding of the requirements of the law, or that he had actual belief that in good faith believed that he had the

made a return even though he may not have, or that he in good faith believed that he had the right to assert his Constitutional rights under the Fifth Amendment on the returns in question in the manner that he did, then you must find that the Defendant's conduct is not willful, and must find the Defendant not guilty.

If you believe that the reasons stated by the Defendant in his refusal to answer Form 1040 questions were given in good faith, and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was willful.

You are instructed that the specific intent of "willfulness" must be proven in order to convict the Defendant of the offenses charged in Count II and III. The term "willfully," used in connection with these offenses, means voluntarily, purposefully, deliberately, with evil motives, or with bad purpose. Mere negligence, even gross negligence, even reckless disregard for the law, is not sufficient to constitute willfulness under criminal law.

If you find that the Defendant supplied false information to his employer because of negligence inadvertance, accident or reckless disregard for the requirement of the law, or that he had actual belief that in good faith he had no tax liabilities for the years in question, then you must find that the Defendant's conduct was not willful, and you must find the Defendant not

guilty.

There were two instructions offered on the Fifth Amendment itself, as the Petitioner had claimed the privilege both on the tax return in answer to specific questions, and on the witness stand. These were numbers 6 and 7 as follows:

> You are instructed that one of the primary functions of the Fifth Amendment privilege against self-incrimination is to protect innocent men. Every person is entitled to the full enjoyment of the Constitutional privilege against self-incrimination.
>
> You are instructed that you are not to make any inference of guilt on the part of Defendant by the fact that he asserted his Constitutional rights under the Fifth Amendment as a United States citizen on his tax return for the year 1976. Information given on a tax return is testimonial and to infer guilt on the part of the Defendant for asserting that right would make a hollow mockery of the exercise of this privilege itself.

All of these were denied and in addition one based on Bishop v. U.S., 412 US 346, 93 SCt 2008 (1973), 36 LEd2d 941, number 16, as follows:

> You are instructed that the requirement of an offense committed willfully is not met if a taxpayer has relied in good faith upon a prior decision of this Court or the Supreme Court of the United States of America and if you find from the evidence that the Defendant did in good faith rely on a prior decision of this court or the Supreme Court of the United States of America, then you must find the Defendant not guilty.

This instruction would have at least opened up the defense of good faith based on reliance on this Court's opinions, but this avenue also was closed by the Court.

In addition, the U.S. Court of Appeals for the Ninth Circuit has been granting instructions which allow a good faith defense to these charges.

The model jury instruction concerning "willfulness" in a §7203 charge out of Devitt and Blackmar, §35.31, comes from a Ninth Circuit case. Cooley v. U.S. 501 F2d 1249 (9th Cir. 1974), cert. denied. 419 US 1123 (1975) stands for the proposition that a person cannot be con-

victed under §7203, if he is honestly mistaken about the requirements of the law. And, if a person believes that he has done all that the law requires he cannot be guilty of the criminal intent to willfully file a tax return; and it is for the jury to decide whether he acted in good faith or whether he willfully intended to file a tax return. This is also set out in U.S. v. Carlson, 617 F2d 518 (9th Circ. 1980) at page 523.

This merely states the law as it has come down from this Court in Murdock but the Fifth Circuit has declined to accept this definition of "willful".

III.

Since, as described in II. above, the Petitioner had a right to a "good faith" defense to the charges, he had a right to testity in his own behalf about that good faith.

However, the trial Court not only

denied the jury instructions on good faith, the attempts of the Defendant to show what he had relied upon in forming his beliefs, both as to case law and as to other material, were denied by the Court.

The Court even sustained objections on behalf of the government to the Petitioner giving even the citation to a particular Court case he had relied upon and instructed the jury to disregard it. (See Transcript of Trial, Volume II, page 326). The Bishop case cited above gives taxpayers at least the right to rely on decisions of this Court in their actions. This right includes the right to explain to a jury exactly what was relied upon. However, the trial Court denied the Petitioner this right, and the Court of Appeals refused to even discuss the issue.

IV.

The basic principles that this

Court has set forth that apply to this question are as follows:

One of the primary requirements of statutory crimes is that the crime be defined with appropriate defiteness. As a matter of due process, no one may be required, at the peril of life, liberty or property to speculate as to the meaning of penal statutes; all are entitled to be informed as to what the government commands or forbids. Haynes v. Oradell, 425 US 610, 96 SCt 1755, 48 LEd2d 243 (1976). The practice of a court's resolving questions concerning the ambit of a criminal statute in favor of lenity does not merely reflect a convenient maxim of statutory construction, but rather, is rooted in fundamental principals of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited; thus, to insure that the legislature speaks with special clarity

when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably proscribed. Dunn v. U.S., 442 US 100, 99 SCt 2190, 60 LEd2d 743 (1979).

The Court is bound to accept that definition which is more lenient to the Defendant, Simpson v. U.S., 435 US 6, 95 SCt 909, 55 LEd2d 70 (1978).

A. The §7203 Count

The specific ambiguity in regard to the §7203 Count has to do with 25 USC §6012. That section is the one which details when you must file a return and thereby be subject to §7203 for failure to do so.

There are two possible constructions for §6012, and this is an issue which needs to be settled, but so far has not explicitly been so by this Court. They are, first, that in §6012 the word "gross

income" includes ordinary wages; and second, that "gross income" includes only income derived from a privilege or license granted by the government.

The first construction comes from common usage by the Internal Revenue Service, and a reading of the Sixteenth Amendment without regard to either its intent or construction given to it by this Court.

The second construction flows from the intent of the Sixteenth Amendment, and the case law before and after it. To understand the meaning of this provision of the Constitution, it must be placed in the context of its enactment. Congress had previously enacted an income tax in 1894. This was found to be unconstitutional in the famous case of Pollock v. Farmers Loan & Trust Co., 157 US 15 SCt 673, 39 LEd 759, later on reh, 158 US 601, 15 SCt 912, 39 LEd 1108 (1894).

It failed because it was held to be a direct tax on property or income derived from property and in want of apportionment in contravention of Article I, §2,cl.3, and Article I,§9, cl.4. "We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes... We are of the opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes... The tax... so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation." Pollock v. Farmers' Loan & Trust Co., supra, at 637.

In 1913, the Sixteenth Amendment became a part of the Constitution. In

a landmark decision following its enactment, the Supreme Court explained the meaning of that Amendment. Brushaber v. Union Pacific R.R. Co., 240 US 1, 36 SCt 236, 60 LEd 493 (1915).

"(C)onfusion... arises from the conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation, that is, a power to levy an income tax which although direct should not be subject to the regulation of apportionment applicable to all other direct taxes... (T)he far reaching effect of the erroneous assumption... clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another. That is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that

all direct taxes be apportioned. This result instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our Constitution and multiply confusion."

> (T)he contention that the Amendment treats a tax on income as a direct tax... is also wholly without foundation... The Amendment contains nothing repudiating or challenging the ruling in the Pollack case. Brushaber v. Union Pacific R.R. Co., supra, 11-12, 18-19.

What the amendment did accomplish was to declare that the income from real and personal property is to be considered as falling within ambit of Article I, Sec. 8, cl. 1. It operates to separate the income from whatever real or personal property source from which it is derived; and thus the resulting excise tax was not subject to apportionment. An income tax,

however, remains in its nature an excise regardless of the Sixteenth Amendment. Brushaber v. Union Pacific R.R. Co., supra, at 17. Therefore, as an excise it can only be levied as rights bestowed by the state.

The word "excise" means "... every form of taxation which is not a burden laid directly on person or property, or every form of charge imposed by public authority for the purpose of raising revenue on the performance of an act, the enjoyment of a privilege, or the engaging in an occupation." 33 Corpus Juris Secundum, "Excise." pp.110-111.

"Excise" is defined to be an inland imposition, sometimes on the manufacture, sale, or consumption of a commodity and sometimes on licenses to pursue certain occupations and corporate privileges. A charge for the privilege of following an occupation or trade, or carrying on a

business, gives a fairly good working idea of what an excise tax is. 47 C.J.S. "Internal Revenue", Section 1, pp. 125-126.

An "excise", then, is a charge or tax levied upon the doing of a certain specified act or upon the performance of certain specified activities associated with privileges granted by the taxing authority.

> The terms "excise" tax and "privlege" tax are synonymous, and the two are often used interchangeably. American Airways v. Wallace 57 F. 2d 877, 880. See also: East Ohio Gas Co. v. Tax Commission of Ohio 43 F2d 171 (1930).

Further, the proper measure of such an excise, once imposed is the income derived from the privilege. Flint v. Stone Trace Co., 31 SCt 342, 55 LEd 389 (1910).

The important distinction to be maintained, however, is that an excise is a charge for doing an activity under license from the sovereign or under

special privilege. It is not a tax on an income per se, or all income, but the only income resulting from the license or privilege is the proper measure of the excise tax. That this is the true meaning of excise is shown by Penn Mutual Indemnity Company (Dissolved) v. Commissioner. 32 Tax Court 653. There, petitioner insurance company sought a ruling of "no tax due" because it had suffered losses greater than receipts and thus argued that it had no "income" and that to tax it would be unconstitutional. Losses of the nature involved, however, are not recognized by Section 207)a)(2) of the Internal Revenue Code of 1939. The tax was held constitutional as a proper excise. This seemingly harsh result is in accord with the constitutional basis of taxation. As an excise on the business of insurance and underwriting, the tax power is unlimited. The mere power

to tax really is the power to destroy. That is why the Framers of the Constitution made it a requirement that unapportioned internal taxation be limied to excises.

Taxes being of practical necessity, it was thought proper to tax activities licensed by the sovereign or under sovereign privilege. The Sixteenth Amendment allowed the measure of the taxation to be income (broadly defined) from whatever source derived, but, only that income associated with the carrying on of licensed or privileged activities is allowed.

This second construction, i.e., that the Sixteenth Amendment allows only an excise tax, is not strained, forced, illogical or unreasonable, rather it flows freely from the law. Therefore, by applying those three principals set forth at the beginning of IV. above, the Peti-

tioner cannot be held criminally liable (although there is no restraint upon the Internal Revenue pursuing this in a civil proceeding) for construing the ambiguity in the law in his favor.

B. The §7205 Counts

The same issue as set forth in A. above applies here as well. Even though under 26 USC §3402, the Petitioner must file a W-4 form with his employer, if his wages are not taxable under §6012. he is entitled to file "exempt", and again cannot be held criminally liable for construing the ambiguity in the law in his favor.

There is a second issue with the §7205 charges which flows from the ambiguity in the term "liability for taxes." This comes from the W-4 form signed by the Petitioner which states "I incurred no liability for federal income tax for the preceeding year and anticipate I will

incur no liability for income taxes this year."

This can be construed two ways. First, that you have incurred a liability if at any time during the year you owed a federal income tax to the government. Second that you have not incurred a liability for that year if you have paid all that you owe, either before the year is out, or when the return is filed.

The biggest problem is that the term "liability for taxes" or "tax liability" is not defined in the United States Code at all. Since this forces taxpayers to speculate, at peril of property or liberty, as to its meaning, due process requires that there be no criminal liability attached to the speculation.

In addition, there is a problem with the word "incurred" as well. The word "incur" by Black's Law Dictionary, Revised Fourth Edition, means to have lia-

bility cast upon one by act or operation of law. Strictly speaking then, a taxpayer does not have liability cast upon him for income tax by operation of law until the federal income tax is actually assessed against him. 26 USC §6201 (a) (1) provides that the Secretary (of the Treasury) shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title. This means that for income tax purposes, the Secretary has the authority to assess the tax, and to assess it upon the amounts determined to be due by the taxpayer, or on the amount as determined by the Secretary.

The method of assessment is prescribed in §6203 which says that the assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary.

In this case the government introduced Certificates of Assessments and Payments concerning the Petitioner for the years in question. However, those certificates revealed that there had been no assessments made against the Petitioner for 1975, 1976 or 1977. Therefore, since assessments have not yet been made for those years, the Petitioner has not "incurred" any tax liability for those years, and the statements made on the W-4 forms are true, not false and fraudulent.

Again, applying those three principals outlined at the beginning of IV. above the Petitioner cannot be held criminally liable for his W-4 forms as filed.

V.

This Court, in a long line of decisions, has established the rule that illegally obtained evidence cannot be used against an individual in a subse-

quent criminal trial.

The evidence introduced in this cause concerning the bank records of the Petitioner were all obtained under an IRS summons. There was a petition to enforce the summons filed in federal court. A U.S. Magistrate, acting without the authority to do so, ordered enforcement of the summons. The Internal Revenue Service then obtained the records on the improper Order, as the Magistrate did not have the jurisdiction to enter the Order.

When these issues were raised on a Motion to Suppress, the trial Court entered its Order affirming the enforcement of the summons, but this was after the fact. Indeed, at the time of the trial herein, the action affirming the enforcement was not final, as it was being appealed to the Fifth Circuit.

Since the Internal Revenue Service obtained the material without a valid

Court Order, the evidence should have been suppressed.

CONCLUSION

As can be seen, the U.S. Court of Appeals for the Fifth Circuit has decided these questions of law in a way which conflicts with the applicable decisions of this Court.

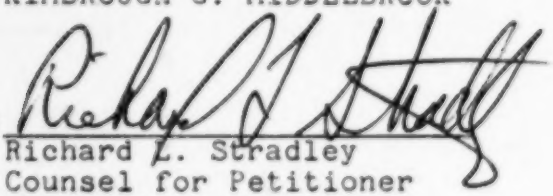
In addition, there exists a very serious conflict between the Fifth Circuit and the Ninth Circuit as to what constitues a "good faith" defense to these types of charges. The Ninth Circuit's rulings appear to be in alignment with the past decisions of this Court, however, this Court needs to grant certiorari to resolve this conflict, as personal liberties are at stake.

Accordingly, the Court of Appeals decision affirming Petitioner's conviction should be reversed and the infor-

mation should be dismissed. Or, in the alternative, a new trial should be ordered. Therefore, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KIMBROUGH G. MIDDLEBROOK

BY: 

Richard L. Stradley
Counsel for Petitioner
4515 Miller Creek Road
Missoula, Montana 59803
406-251-4034

AFFIDAVIT OF SERVICE

Personally appeared before me, the undersigned authority in and for the State of Montana, County of Missoula, the within named Richard L. Stradley, who after being by me first duly sworn stated on oath that he had mailed, postage prepaid, by U.S. Mail, a true and correct copy of the above and foregoing Petition to Counsel for the Respondent, the Solicitor General, Depart of Justice,

Washington, D.C. 20530, on the 21st day of August, 1981, and a copy of the resubmitted Petition on the 4th day of September, 1981.

Richard L. Stradley

SWORN TO and subscribed before me on this the 4th day of September, 1981.

K B Hart
NOTARY PUBLIC

My Commission Expires:

May 15, 1982

APPENDIX

JUDGMENT TO BE REVIEWED:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-3382

UNITED STATES OF AMERICA,
Plaintiff- Appellee

VS.

KIMBROUGH G. MIDDLEBROOK
Defendant- Appellant

Appeal from the United States

District Court for the

Southern District of Mississippi

(June 22, 1981)

Before BROWN and GARZA, Circuit Judges,

and SCHWARTZ, * District Judge.

PER CURIAM: AFFIRMED. See Local Rule

Rule 21. 1/

1/ See N.L.R.B. v. Amalagated Clothing Workers of America, 1970, 430, F2d 966.

*District Judge of Eastern District of Louisiana, Sitting by Designation.

Constitution of the United States, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life and

and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compenstaion.

Constitution of the United States, Sixteenth Amendment

The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Constitution of the United States, Article 1, §2, cl. 3.

Representatives and direct taxes shall be apportioned among the several States...

Constitution of the United States, Article 1, §8,cl.1

The Congress shall have power to lay

and collect taxes, duties, imposts and excises...

Constitution of the United States, Article 1, §9, cl. 4

No capitation, or other direct tax shall be laid unless in proportion to the census or enumeration herein before to be taken.

26 USC §7203

Any person required under this title to... make a return... who willfully fails to... make such return... shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 USC §7205

Any individual required to supply information to his employer under section 3402 who willfully supplies false or

fraudulent information... shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

26 USC §3402

... On or before the date of commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled. ... Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter upon a payment of wages to an employee if there is in effect with respect to such payment a withholding exemption certificate (in such form and containing such other

information as the Secretary may prescribe) furnished to the employer by the employee certifying that the employee---

(1) incurred no liability for income tax imposed under subtitle A for his preceding taxable year, and

(2) anticipates that he will incur no liability for income tax imposed under subtitle A for his current taxable year. ...

26 USC §6012

... Returns with respect to income taxes under subtitle A shall be made by the following:

(1)(A) Every individual having for the taxable year a gross income of $750 or more, except that a return shall not be required of an individual... who is entitled to make a joint return under section 6013 and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less

than $4,700...

26 USC §6201

... The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title...

26 USC §6203

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary...

GOVERNMENT'S INSTRUCTION NO.____

As I stated earlier, the third element which the government must prove beyond a reasonable doubt is that the Defendant's failure to make the return in question was willfully committed.

The term willfully for purposes of these instructions as to Count I means voluntarily, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently.

The failure to make a timely return is willful if the Defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do that which he knew the law required, that is to say, with the purpose to disobey or disregard the law which requires him to make a timely return.

The willfulness which the govern-

ment must prove beyond a reasonable doubt does not require the government to prove that the Defendant had a purpose to evade a tax or to defraud the government.

The intentional refusal by a taxpayer to reflect little or no information on a tax return form as to his income or expenses with the excuse that to do so would violate his right against self-incrimination under the Fifth Amendment to the Constitution is no legal justification for not filing a timely complete income tax return reflecting the amounts of income for 1976. The same is true for an excuse that Federal Reserve notes are not legal tender or that the Federal Reserve system is unconstitutional. These are not legal justifications for willful failure to file.

The only justification for not filing a tax return when it is required by law to be filed is a good faith misunderstand-

ing by the taxpayer as to his legal obligation to actually file the return or an inadvertent or careless or negligent failure to actually file such a return.

What the government must prove, to the element of willfulness is a voluntary, intentional violation by Defendant of his known legal duty to file a true, correct and complete return of his income, i.e., the Defendant deliberately and specifically intended not to make a return of his income which he knew ought to be made and filed.

U.S. v. Middlebrook
Crim. No. J79-00003(N)

GOVERNMENT'S INSTRUCTION NO.___

You are further instructed that a taxpayer may not refuse to enter on his return the necessary information as to his income and expenses by claiming a privilege against self-incrimination. The Fifth Amendment to the Constitution of the United States does not protect or shield a taxpayer from revealing the required financial information or amount of his income on his income tax return. Therefore, Defendant's claim of a Fifth Amendment privilege against disclosing his income on a tax return should not be considered by the jury as good faith defense to the charge of willful failure to file.

U.S. v. Middlebrook
Crim. No. J79-00003(N)

GOVERNMENT'S INSTRUCTION NO.___

You are further instructed that it is no defense to the willful failure to file charge for Defendant to say that Federal Reserve Notes do not constitute dollars or income for tax purposes or that the Federal Reserve System is unconstitutional. Federal Reserve Notes are the common medium of exchange in all financial affairs of this country. They are legal tender for tax purposes or income or otherwise.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS
CLERK

No. 81-557

In the Supreme Court of the United States

OCTOBER TERM, 1981

KIMBROUGH G. MIDDLEBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Brown v. *Walker*, 161 U.S. 591 4

Brushaber v. *Union Pacific R.R.*, 240 U.S. 1 5

Clark v. *United States*, 289 U.S. 1 4

Cooley v. *United States*, 501 F. 2d 1249, cert. denied, 419 U.S. 1123 7

Commissioner v. *Smith*, 324 U.S. 177 5

Garner v. *United States*, 424 U.S. 648 4

Mason v. *United States*, 244 U.S. 362 4

Roberts v. *United States*, 445 U.S. 552 4

Rogers v. *United States*, 340 U.S. 367 4

United States v. *Brown*, 591 F. 2d 307, cert. denied, 442 U.S. 913 5

United States v. *Carlson*, 617 F. 2d 518, cert. denied, 449 U.S. 1010 ..... 3, 4

United States v. *Hawk*, 497 F. 2d 365 5

United States v. *LaSalle National Bank*, 437 U.S. 298 5

United States v. *Johnson*, 577 F. 2d 1304 ..... 5, 6

United States v. *Malinowski*, 472 F. 2d 850, cert. denied, 411 U.S. 970 6

United States v. *Matosky*, 421 F. 2d 410 5

United States v. *Pomponio*, 429 U.S. 10 6

United States v. *Powell*, 379 U.S. 48 5

Page

Cases—(Continued):

United States v. *Quilty*, 541 F. 2d 172 5

United States v. *Sullivan*, 274 U.S. 259 ..... 4, 6

United States v. *Wellendorf*, 574 F. 2d 1289 7

United States v. *Wolters*, 656 F. 2d 483 3

Constitution and statutes:

United States Constitution, Fifth Amendment 3, 4

26 U.S.C. 7203 1

26 U.S.C. 7205 ..... 1, 6

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The questions presented by the petition in this criminal tax case are: (1) whether petitioner's assertion of his Fifth Amendment privilege against compulsory self-incrimination with respect to his 1976 federal income tax return precluded his conviction for willfully failing to file a return for that year; and (2) whether the trial judge properly instructed the jury on the element of willfulness.

The pertinent facts may be summarized as follows: following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on one count of willfully failing to file a federal income tax return for 1976 and two counts of willfully filing false and fraudulent withholding exemption certificates, in violation of 26 U.S.C. 7203 and 7205. He was sentenced to six months' imprisonment and a $1,000 fine on Count I. On the remaining two counts, the court suspended imposition of

sentence and petitioner was placed on two years' probation to commence upon release from confinement. The court of appeals affirmed (Pet. App. A-1; Appellee's Br. 4).

The evidence at trial established that petitioner received wages and interest income in 1976 of $30,177.08 (I Tr. 208).[1] On April 14, 1977, he filed an Individual Income Tax Return Form 1040 for 1976, which he signed, but which contained no financial data from which his tax liability could be computed (Exh. G-5; I Tr. 33-34). Instead, petitioner's Form 1040 contained asterisks in places calling for information about income, tax payments, and credits (I Tr. 33). At the bottom of the Form 1040, petitioner stated (II Tr. 324):

> I do not understand this return nor the laws that may apply to me. Signature involuntarily given under threat of statutory punishment. I request complete immunity per 18 U.S.C. §6002 & §6004 before waiving any constitutional or natural rights, including the Fifth Amendment guarantee of not being a witness against myself.

In the margin of his Form 1040, petitioner also had written, "This return consists of 32 attached pages plus a four page insert. I offer to amend or refile this return exactly as you wish it if you will please show me how to do so without waiving my constitutional rights" (I Tr. 51-52). Petitioner had filed valid income tax returns for 1972, 1973 and 1974 (I Tr. 44).

On January 20, 1976, petitioner presented his employer, Southern Railway Company, with a Form W-4E, withholding exemption certificate, stating under penalty of perjury that he had no tax liability for 1975 and that he anticipated

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[1] "I Tr." and "II Tr." refer to the two-volume transcript of the trial; "Exh." refers to the exhibits submitted in that proceeding; Appellee's Br. refers to the brief for the United States in the Court of Appeals.

no tax liability for 1976[2] (1 Tr. 107). Petitioner gave a similar Form W-4E to Southern Railway on April 15, 1977 (1 Tr. 110). Based on these withholding exemption certificates, Southern Railway stopped withholding federal income taxes from petitioner's salary (1 Tr. 108).

1. Petitioner argues (Pet. 5-12) that if he had filed a valid income tax return for 1976, showing wages as gross income, then that return would have been testimony that the Form W-4E (filed earlier in 1976 and again in 1977) was false and fraudulent. Petitioner claims that this "conflict" violates his Fifth Amendment privilege against compulsory self-incrimination.

This claim was properly rejected in *United States* v. *Carlson*, 617 F. 2d 518 (9th Cir.), cert. denied, 449 U.S. 1010 (1980), upon which we rely. There, the court held "that an individual who seeks to frustrate the tax laws by claiming too many withholding exemptions, with an eye to covering that crime and evading the tax return requirement by assertion of the Fifth Amendment, is not entitled to the amendment's protection" (617 F. 2d 523). The court reasoned that the taxpayer had attempted to take advantage of the privilege's protective capacity in furtherance of a calculated effort to avoid the payment of taxes. *Id.* at 522. The assertion of the privilege in *Carlson*, like petitioner's assertion here, was used "more as a sword than a shield." *Ibid.* Accord, *United States* v. *Wolters*, 656 F. 2d 483 (9th Cir. 1981).

The Ninth Circuit's reliance in *Carlson* on the history and purpose of the privilege against self-incrimination, and its

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[2]For 1975, petitioner had filed a purported tax return, similar to the one he filed for 1976, which said at the bottom of the Form 1040, "This [*] means specific objection is made under the 5th Amendment, U.S. Constitution, to the question as to Federal Reserve Note, and that similar objection is made to the question under the 1st, 4th, 7th, 8th, 9th, 10th, 13th, 14th and 16th Amendments" (II Tr. 311).

finding that the defendant was raising the privilege not in good faith, but rather as a subterfuge to avoid payment of his taxes, is entirely consistent with this Court's repeated holding that "[i]t is the duty of a court to determine the legitimacy of a [party's] reliance upon the Fifth Amendment." *Roberts* v. *United States*, 445 U.S. 552, 560 n.7 (1980). An individual may not invoke the privilege if his real purpose is to avoid giving information that "he simply would prefer not to give" (*ibid.*). See also *Mason* v. *United States*, 244 U.S. 362, 364-367 (1917); *Garner* v. *United States*, 424 U.S. 648, 658-659 n.11 (1976); *Rogers* v. *United States*, 340 U.S. 367, 371-375 (1951); *Brown* v. *Walker*, 161 U.S. 591, 599-600 (1896). See also *Clark* v. *United States*, 289 U.S. 1, 14 (1933).[3]

Acceptance of petitioner's contentions here would mean that any tax protestor could avoid filing income tax returns by adopting the simple expedient of claiming complete exemption or an inflated number of allowances on his Form W-4E in a given tax year sufficient to avoid withholding from his wages, and thereafter refusing to file annual tax returns on the ground that the information on his return might tend to reveal his earlier misconduct. As the court stated in *United States* v. *Carlson, supra*, 617 F. 2d at 522-523, "the character and urgency of the public interest in raising revenue through self-reporting weight heavily against affording the privilege [under such circumstances]. The federal government's power to raise revenue is its lifeblood. Were taxpayers permitted to employ [petitioner's]

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[3]Moreover, petitioner did not invoke the privilege with respect to particular questions, but rather asserted a blanket privilege with respect to all financial information that was sought. The Fifth Amendment does not permit a taxpayer "to draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927).

scheme, they could avoid filing completed tax returns and thereby severely impair the government's ability to determine tax liability." Accord, *United States* v. *Brown*, 591 F. 2d 307, 308, 311 (5th Cir.), cert. denied, 442 U.S. 913 (1979); *United States* v. *Johnson*, 577 F. 2d 1304, 1310-1311 (5th Cir. 1978).[4]

2. Petitioner also asserts (Pet. 12-22) that the district court erred in its refusal to use petitioner's proposed instructions on willfulness and the defense of good faith, and that this refusal has created a conflict between circuits (see Pet. 21-22).

The district court, however, correctly instructed the jury. It stated that what the government must prove "is the voluntary intentional violation by the defendant of his known legal duty to file a true, correct and complete return of his income * * * that he deliberately and specifically intended not to make a return of his income, and more specifically the amount of his income on the return which he knew ought to be made and filed" (II Tr. 399). As for petitioner's good faith defense, the court instructed the jury that a good faith misunderstanding by petitioner of his legal obligation actually to file a return would be a justification for not doing so. The court also stated that the claim of Fifth Amendment privilege could be a defense only if the jury concluded from the evidence that the claim, though erroneous, was made in good faith (II Tr. 399). Factors that the jury could consider in this regard included evidence, if

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[4]Petitioner's remaining arguments (Pet. 24-39), that the income tax is unconstitutional as a direct tax, that wages are not income, and that evidence gathered in a civil tax investigation may not be used in a criminal tax investigation, are without merit and do not warrant further review. See, *e.g.*, *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978); *United States* v. *Powell*, 379 U.S. 48 (1964); *Commissioner* v. *Smith*, 324 U.S. 177, 181 (1945); *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1 (1916); *United States* v. *Quilty*, 541 F. 2d 172 (7th Cir. 1976).

any, that petitioner was afforded an opportunity to reconsider and ignored it, or that he was aware of the inadequacy of such a return and deliberately and intentionally proceeded to file the return anyway (II Tr. 399-400).

These jury instructions are substantially the same as those approved by this Court in *United States* v. *Pomponio*, 429 U.S. 10 (1976). The district court was not required to use the words "evil motive" or "bad intent," as petitioner sought (Pet. 18-19). All that is required is instructions that communicate the proper notion of specific intent in understandable terms. *United States* v. *Hawk*, 497 F. 2d 365, 369 (9th Cir. 1974). This intent is the deliberate intention not to file returns that the taxpayer knew ought to be filed. *United States* v. *Matosky*, 421 F. 2d 410, 412 (7th Cir.), cert. denied, 398 U.S. 904 (1970).[5] The instructions here adequately met these requirements.

As for petitioner's "good faith" arguments (Pet. 22-23), the district court's instructions (II Tr. 399-400) were consistent with the Fifth Circuit's statement that this defense "assumes that a good faith claim of the privilege is not made at one's peril and that erroneous taxpayers will be afforded the opportunity to reconsider their responses * * *." *United States* v. *Johnson*, 577 F. 2d 1304, 1311 (5th Cir. 1978). But as the Court stated in *United States* v. *Sullivan*, *supra*, 274 U.S. at 263, "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." Petitioner's blanket claim was tantamount to filing no return at all.

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[5]This reasoning also applies to the element of willfulness required for a conviction under 26 U.S.C. 7205 for willfully filing a false withholding certificate. A "bad purpose" or "evil motive" instruction is not necessary. *United States* v. *Malinowski*, 472 F. 2d 850, 855 (3d Cir.), cert. denied, 411 U.S. 970 (1973).

Indeed, his acknowledged reason for his blanket claim was to prevent discovery of his false withholding form—a purpose quite inconsistent with any "good faith" defense. See also *United States* v. *Wellendorf*, 574 F. 2d 1289 (5th Cir. 1978).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

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[6]Contrary to petitioner's assertion, the decision below does not conflict with *Cooley* v. *United States*, 501 F. 2d 1249 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975). This claim rests upon his contention that *Cooley* allows for a good faith defense. But as we have noted, the district court gave an instruction on good faith (II Tr. 399) which closely parallels that given in *Cooley*, *supra*, 501 F. 2d at 1253 n.4.

DOJ-1981-11